



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.40,45 & 53 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. Onyina – Ag.SPM delivered on 17th February 2014 in Kibera CM.C. CR. Case No.5291 of 2009)

EMILIO MUKUNDI NJUE.....1ST
APPELLANT

PETER WARUI MWANGI2ND
APPELLANT

ROBERT GITAU MACHARIA3RD
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Emilio Mukundi Njue, Peter Warui Mwangi and Robert Gitau Macharia were charged with six (6) others (who were however acquitted of the main charges) with several offences under the **Penal Code** but were convicted of the two (2) main charges. The two main charges were those of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of both counts were that on 30th October 2009 at Nkoroi Village in Kajiado North District, the Appellants, jointly with others not before court while armed with dangerous weapons, namely an AK 47 assault rifle and knives robbed Florence Wanjau Wanyoike and Gerald Wambugu Gakuo (the complainants) of the sum of Kshs.415,000/-, assorted electronics as listed in the charge sheet, assorted clothes and shoes as listed in the charge sheet, mobile phones as listed in the charge sheet and motor vehicle registration No. KBG 598M Toyota Vitz and at or immediately before or immediately after the time of such robbery, injured Susan Kendi, who was with the complainants, by stabbing her on the head with a knife. When the Appellants were arraigned before the trial magistrate’s court, they pleaded not guilty to the charge. After full trial, they were convicted as charged and sentenced to death in respect of the 1st count. The sentence in respect of the 2nd count was held in abeyance.

The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal to this court challenging their respective convictions and sentences. In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that was not up to the standard. In particular, they took issue with the manner in which the evidence of identification was received by the court yet there was

no evidence that the complainants gave the description of their assailants in the first report that was made to the police. They were aggrieved that they had been convicted on the basis of evidence that did not establish their guilt to the required standard of proof beyond any reasonable doubt. They took issue with the manner in which the trial court applied the doctrine of recent possession to find them guilty of the two charges yet no evidence was laid to connect them with the recovery of the stolen items. They faulted the trial magistrate for upholding the prosecution's case against them yet he failed to consider their respective defences, which in their view, exonerated them from the crime. They faulted the manner in which the evidence of police identification parades was received by the trial magistrate's court. It was their view that the said evidence should not have been received due to material breaches of the law in their conduct. The Appellants challenged the entire proceedings on the basis that the convicting magistrate did not give them a chance to have witnesses who had testified before the previous magistrates recalled as provided under **Section 200(3) of the Criminal Procedure Code**. In the circumstances, it was the Appellants' appeal that the proceedings that led to their conviction was incurably defective and should be set aside. They finally faulted the trial magistrate for relying on inconsistent, unreliable, uncorroborated and incredible evidence of the prosecution witnesses to convict them. In the premises therefore, they urged the court to allow their respective appeals, quash their convictions and set aside the death sentence that was imposed on them.

During the hearing of the appeal, the respective appeals lodged by the Appellants were consolidated for the purpose of the determination of the appeal. 1st and 2nd Appellants presented to the court written submission in support of their respective appeals. They also made oral arguments urging the court to allow their respective appeals. Mr. K'Opere for the 3rd Appellant relied on the written submission filed by the 3rd Appellant. He also made oral submission urging the court to allow the appeal. Ms. Kule for the State opposed the appeal. She submitted that the prosecution had established its case on the charges that the Appellants were convicted of to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeals. This court shall revert to the argument made on this appeal after briefly setting out the facts of this appeal.

The complainant, Florence Wanjau Wanyoike was at the material time a business lady at Ongata Rongai. She operated a hardware business. She also had transport business on the side. She lived in Nkoroi area with members of her family who included her two sons, Gerald Wambugu Gakuo and Antony Wanyoike Mbatia. The latter was then aged 14 years at the time of the incident. The complainant also lived with a cousin by the name Susan Kendi who assisted her in her business and also at home. The complainant testified as PW1 while her son Gerald Wambugu Gakuo testified as PW3. According to PW3, on the material evening of 30th October 2009, at about 6.00 p.m., he arrived home with two of their drivers in one of their lorries. They drove into the compound and parked the lorry. While inside the compound, they saw a group of people approaching them from both the driver's side and the passenger side of the lorry. One of them was armed with an AK 47 rifle. They ordered them to alight from the lorry. They then escorted them to the main house within the compound. Inside the house, they found their accomplices of the men who had ordered them out of the lorry already in the house. They included some women.

The gang had ordered the househelp, Antony Wanyoike Mbatia (who testified as PW10) and Susan Kendi (who testified as PW4) to lie down on the floor of the sittingroom. Their watchman had also been similarly escorted to the sittingroom and ordered to lie down. PW3 testified that he was ordered to surrender the money that was in his possession. He gave the gang Kshs.15,000/-. After being further threatened with dire consequences, he was escorted to his bedroom where he gave the gang a further sum of Kshs.100,000/-. PW10 was ordered to direct the gang to his mother's bedroom. The bedroom door was broken into. The bedroom was ransacked. The gang was looking for the jewelry and cash from the bedroom. They then ordered PW10 to return to the sittingroom. During this time, PW10 was slapped and injured on his face. PW4 was stabbed on the head with a knife. She was bleeding profusely from the injury inflicted on her head. The gang did not leave the house but lay in wait of PW1 who was returning home from work.

According to PW1, she arrived at her home at Nkoroi at about 8.15 p.m. She was driving her motor vehicle registration No.KBG 598M Toyota Vitz. She testified that her compound had a stone wall perimeter fence in some parts while the other part was fenced with iron sheets. She drove into her

compound and saw a motor vehicle registration No.KAW white in colour parked in her compound. She was not familiar with the motor vehicle. She parked her motor vehicle. As she was alighting from the motor vehicle, she was confronted by the gang of robbers. They escorted her into the house and into her bedroom. They ordered her to give them the money that was in her possession. She gave them Kshs.300,000/-. They insisted that they wanted more money. PW1 volunteered to escort them to the bank to withdraw more money which was in her account at the bank. They declined the offer. They insisted that she gives them all the money that was in her possession. She told them that she did not have any other money. She was roughed up. A member of the gang even attempted to rape her. She was saved from the sexual assault because she explained that she was HIV positive. The gang then ransacked the house and stole therefrom electronic goods including a Samsung television set, an electric heater (Ashton Meyer), Panasonic video player, a Compaq computer, a printer, a weighing machine, a digital camera, Sony Hi-Fi CD changers, A Sony music system, assorted clothes and shoes, bed sheets and table clothes and seven (7) mobile phones make Nokia, Samsung and Motorola. When the robbers left the homestead, they took away PW1's motor vehicle registration No.KBG 598M.

PW2, PW3, PW4 and PW10 testified that in the course of the robbery they were able to identify the Appellants. They testified that the Appellants were accompanied by a relative, Paulina Nyawira Wanyoike when they committed the robbery. Paulina Nyawira Wanyoike was a co-accused of the Appellants and was convicted with them. Although they did not give the description of their assailants in the first report that was made to the police, it was their testimony that in the period that the robbery took place, they had sufficient time to note and memorize the physical features of the Appellants. They pointed out the Appellants in an identification parade which was conducted by PW9 Chief Inspector Simon Thirikwa, the then Officer Commanding Kisavaponi Police Post which is under Ngong Police Station and PW11 Chief Inspector Maurice Okui, the then Base Commander of Ongata Rongai Police Station. The identification parades were conducted about two (2) weeks after the robbery incident. The Appellants challenged the credibility of the identification by the said witnesses, in the absence of a description given in the first report that was made to the police.

PW5 Peter Mwangi testified that he was the owner of motor vehicle registration No.KAW 356F Toyota Ipsum white in colour. He recalled that on 30th October 2009 at about 5.00 p.m., while he was at his place of work outside Hilton Hotel, he was approached by a man and woman who introduced themselves as Robert Gitau Macharia (3rd Appellant) and Pauline Nyawira (Appellants' co-accused in the trial court). They wanted to hire his motor vehicle to attend a funeral at Murang'a. He requested the two to show him their place of work and their place of residence. The two took PW5 to two locations at Mlango Kubwa and Ngara. PW5 was suspicious of the two. He was not satisfied that they had given him the correct information regarding their place of work and residence. He was however persuaded by one Paul Gitau who told him that he knew the two. They entered into an agreement for the hire of the motor vehicle. He was paid Kshs.4,000/-. The agreement and the photocopies of the driving licence and identity card of the 3rd Appellant were produced into evidence. The motor vehicle was returned the following day. PW5 was later contacted by the police who informed him that the motor vehicle had been used in a robbery at Ongata Rongai. PW5 identified the 3rd Appellant as the person who hired his motor vehicle.

PW6 APC Stephen Kiso then based at West Wangige AP Camp in Kikuyu District testified that on 31st October 2009 at about 10.00 a.m., he was informed by members of the public that a motor vehicle had been abandoned along the road. He went to the place and saw motor vehicle registration No. KBG 598M. He checked the motor vehicle and found documents with telephone numbers. He called one of the numbers. PW1 picked the call and informed him of her whereabouts. The motor vehicle was taken to the police station and later released to the owner.

After the report was made to the police, investigations commenced. PW14 Cpl William Gichuki was assigned to investigate the case. He visited the scene and was able to record statements from the victims of the robbery. He was informed of the recovery of PW1's motor vehicle. He established that Pauline Nyawira Wanyoike was resident in Nanyuki. On 7th November 2009, accompanied by other police officers, he travelled to Nanyuki. He found Pauline Nyawira Wanyoike at Nanyuki Town in a private hired motor vehicle registration No.KBC 285L Toyota Platz. They arrested the said Pauline Nyawira

Wanyoike. They also arrested the 1st, 2nd and 3rd Appellants who were in the motor vehicle. He recovered a Nokia Mobile phone serial No. 35319803295522 from the 2nd Appellant. This phone was positively identified as one of the phones that were stolen from the complainants during the robbery. The complainant produced a receipt and a warranty in evidence which positively established her ownership of the mobile phone.

Upon interrogating the Appellants, they informed PW14 that they had two AK 47 assault rifles and 58 rounds of ammunition which they kept in a house at Ndenderu. The house belonged to Nancy Wamboi Waweru, the Appellants' co-accused in the trial court. PW14 mobilized other police officers and went to the said house of Nancy Wamboi Waweru. They were accompanied by the Appellants. She produced a suit case wherein were found two AK 47 rifles, 58 rounds of ammunition and some clothes. Nancy Wamboi Waweru informed them that some of the stolen items had been taken by another co-accused of the Appellants' in the trial court called Peter Jovi Ndungu. The said Peter Jovi Ndungu was a taxi driver. He died before the trial was concluded. The charges brought against him were therefore abated. They found him and he took them to the house of one Njuguna who escaped. All the items which were stolen from the house of the complainants were recovered except the cash. Some items were also recovered from the house one John Maina Njoroge. Further investigations revealed that there were others who were involved in robbery. The investigations led into the identification of the body of one Peter Komu at the City Mortuary who was said to have been the mastermind of the robbery. He had been shot on the head. Peter Komu was a relative of the complainant. His body was positively identified by PW7 Henry Wanyoike, a brother of the complainant.

PW12 Cpl Johana Tanui, a Scenes of Crime Officer attached to Ngong Police Station was instructed on 3rd November 2009 and 30th November 2009 to take the photographs of all the items which were stolen in the course of the robbery and later recovered. He also photographed the two AK 47 rifles and rounds of ammunition that were recovered by the team led by the investigating officer. These photographs were produced into evidence. The stolen and recovered items were released to the complainants when the Appellants raised no objection. PW13 CIP Alex Chirchir based at CID Headquarters, produced ballistic reports on behalf of SSP Johnson Mwangela. According to the said reports, the two AK 47 rifles and ammunition that were recovered were firearm and ammunition within the meaning ascribed to them under the **Firearm Act**. The two AK 47 rifles and ammunition were in good order and were capable of being fired. The reports were produced into evidence.

PW1 Dr. Z. Kamau examined PW4 Susan Kendi. He testified that PW4 was injured with a sharp object on the posterior aspect of the left front scalp. He classified the degree of injury as harm. He produced the P3 form as an exhibit in the case. After concluding his investigation, PW14 formed the view that a case had been established to enable the Appellants, and their co-accused, to be charged with the offences for which they were convicted.

When they were put to their defence, the Appellants denied involvement in the robbery. They gave alibi defences on their whereabouts on the evening of 30th October 2009. They narrated the circumstances of their arrest. They testified that they were arrested while they were on their normal business. They denied that they had participated in the robbery in question or that they were positively identified in the course of the robbery or that they were found in possession of the items that were robbed from the complainants. It was their defence therefore that they were innocent and were victims of circumstances.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336,

Ruwalla v R [1957] EA 570”.

In the present appeal, the Appellants raised several grounds of appeal challenging their conviction. The first ground is that they were convicted on the basis of defective proceedings. In particular, the Appellants submitted that the convicting magistrate ignored to uphold their right to either have the case start *de novo* or to have the witnesses recalled as provided under **Section 200(3)** of the **Criminal Procedure Code** which provides that:

“Where a succeeding magistrate commences the hearing of the proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.”

The Appellants argued that they demanded to have the trial to start *de novo* but their request was overruled by the convicting magistrate. They were of the view that the right to recall a witness or witnesses in a trial was not subject to the discretion of the trial magistrate but rather was a right which should be granted as a matter of course once an accused person made a request for the recall of the witnesses. On her part, Ms. Kule for the prosecution argued that it was not mandatory that where an accused person makes a request to recall a witness that that request is granted without the trial court considering all the relevant circumstances of the case. In the present appeal, she submitted that the Appellants were granted the opportunity to recall the witnesses that they wanted recalled but did not take up this opportunity. She also explained that during the entire trial, the Appellants were represented by counsel and therefore their rights were not breached when they failed to take up the chance to recall the witnesses.

What does the record of trial court reveal? Hon. G.Nzioka SPM (now Nzioka J) heard twelve witnesses before her promotion as a Judge of the High Court of Kenya. The proceedings were taken over by Hon. T. Matheka SPM. The Appellants made an application for the case to start *de novo*. Some of the Appellants’ co-accused in the trial court requested to proceed with the hearing from where the previous magistrate had reached. The prosecution objected to the application. In her considered ruling, the Learned Magistrate held thus:

“Thus from the arguments before me, the defence has simply made a demand for de novo and in the circumstances of this case though the witnesses may be found, not all the exhibits will be available and the court ought not to make an order that will not be capable of enforcement. The defence are therefore free to apply for the rehearing any witness who may be available for further hearing. That for de novo hearing will be an exercise in futility. The application is allowed in part.”

Hon. T. Matheka SPM did not hear the case before she ceased having jurisdiction in that court. The proceedings were taken over by Hon. Onyina, Ag. SPM. A similar application was made before him. He granted the defence application to be allowed the right to recall any of the witnesses who had testified for the purposes of further cross-examination. The court however ruled that the hearing would proceed from where the matter had reached in the trial before the previous magistrates. At close of the prosecution’s case, neither the Appellants nor their counsel made an application to recall any of the witnesses who had already testified for further cross-examination before the convicting magistrate.

This is the state of affairs as exists on record. *Were the Appellants denied their right as provided under **Section 200(3)** of the **Criminal Procedure Code** to recall the witnesses who had testified before the previous magistrate for purposes of cross-examination?* The answer is in the negative. The Appellants were given ample opportunity to recall any witness whom they required to be recalled to court for further cross-examination. The Appellants did not take up this opportunity. At the close of the prosecution’s case, none of the Appellants had made the application for the recall of any of the witnesses who had testified before the previous magistrate. This court holds that the assertion by the Appellants that their rights under **Section 200(3)** of the **Criminal Procedure Code** were breached by the trial court is not supported by this court’s record. This court finds no merit with that ground of appeal.

The second broad ground of appeal was that the trial magistrate convicted them on the basis of the evidence of identification which was incredible. It was the Appellants' case that in the absence of the first report of identification being made to the police, the evidence of police identification parade that was later procured by the police was worthless. The prosecution, on the other hand, was of the view that the evidence of identification that was adduced was watertight because the complainants had sufficient time to be able to be positive that they had identified the Appellants. On re-evaluation of the evidence adduced in this regard, this court is partially in agreement with the submission made by the Appellants to the effect that the evidence of identification adduced by the identifying witnesses must be supported by the description that the particular witnesses gave in the first report that they made to the police and also in the first statements that they recorded. In the present appeal, if that evidence of identification was taken by itself, then the Appellants would have a case when they state that they were not properly identified.

However, the circumstances of this appeal are unique. Some of the Appellants' co-accused before the trial court were relatives of the complainants. They were identified by two of the complainants. One relative was shot dead a few days after the robbery incident. He was Peter Komu. The other, Pauline Nyawira Wanyoike was the Appellants' co-accused before the trial court. The Appellants were arrested in the said Pauline Nyawira's company a few days after the robbery. The 3rd Appellant was positively identified by PW5 Peter Mwangi from whom he had hired a motor vehicle that used during the robbery. Again, he was accompanied by the said Pauline Nyawira Wanyoike. This court therefore holds that, taken in context, the evidence of identification adduced by the identifying witnesses which placed the Appellants during the robbery with the co-accused who was recognized by the identifying witnesses, and further that they were arrested in company of the same co-accused a few days after the robbery, the evidence of identification indeed established that the Appellants were at the scene of the robbery, and indeed participated in the robbery of the complainants. This court was persuaded, as the trial court, that the period in which the Appellants were exposed to the identifying witnesses during the robbery was sufficient to enable them to be positive that they had identified them. Further, they gave physical descriptions which matched the physical features of the Appellants. That ground of appeal fails.

If there was any doubt that the Appellants had been positively identified, then that doubt was removed when the Appellants were arrested and found in possession of the items belonging to the complainants that were stolen during the robbery. A mobile phone which was robbed from one of the complainants was recovered in the 2nd Appellant's possession upon his arrest on 7th November 2009. The 2nd Appellant did not give a satisfactory explanation under what circumstances he came to be in possession of a mobile phone which was robbed from the complainants. Further, the Appellants, upon interrogation, led the police to the recovery the AK 47 rifles which were used during the robbery. The majority of the items which were stolen during the robbery were recovered at Ndenderu in Kiambu County at the residence of a friend of the 1st Appellant. It was only the Appellants who had knowledge of the whereabouts of the said stolen items. It was clear to this court that, in both instances, that the doctrine of recent possession applied. The Appellants were found in possession of the items which were robbed from the complainant a few days after the robbery. They did not give a reasonable explanation of how they came to be in possession of the said stolen items. The items were positively identified as belonging to the complainants (see **Malingi –Vs- Republic [1989] KLR 225**).

This court therefore holds that, on re-evaluation of the evidence adduced, the prosecution, established, to the required standard of proof beyond any reasonable doubt that indeed the Appellants robbed the complainants, and in the course of the robbery injured one of the complainants. The Appellants also used dangerous or offensive weapons in the nature of firearms and knives. The Appellants' defences were correctly discounted by the trial court as being self-serving. The grounds of appeal put forward by the Appellants therefore lacks merit. The respective appeals lodged by the Appellants are hereby dismissed. Their respective convictions, and the sentence imposed upon them is hereby confirmed. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE

